Supreme Court, U.S.
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No. 97-1745

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JUAN BARANDIARAN, *et al.*,
Petitioners,

v.

FISHING VESSEL CHLOE Z, OFFICIAL NO. 653391, HER ENGINES, NETS, FURNITURE, etc., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT TCW SPECIAL CREDITS IN OPPOSITION

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QUESTION PRESENTED

Whether a seaman who was not provided by his employer with a written agreement as required by 46 U.S.C. § 10601 is entitled under 46 U.S.C. § 11107 to recover captain's wages as a penalty *in rem* enforceable against the vessel, reducing the proceeds available to pay the vessel's unpaid secured lender.

LIST OF PARTIES AND RULE 29.6 LIST

The parties to this case are Plaintiff and Respondent TCW Special Credits; Plaintiffs-in-Intervention and Petitioners Juan Barandiaran, et al.; and Defendants Fishing Vessel CHLOE Z, Official No. 653391, Her Engines, Nets, Furniture, etc., *In Rem*, and Chloe Z Fishing Co., Inc., *In Personam*.

Respondent TCW Special Credits has no parent companies, non-wholly-owned subsidiaries, or affiliates that have issued shares to the public.

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BRIEF OF RESPONDENT TCW SPECIAL CREDITS IN OPPOSITION

Respondent TCW Special Credits ("TCW") hereby opposes the petition for writ of certiorari filed by Petitioners Juan Barandiaran, et al.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this matter are 46 U.S.C. §§ 10601 and 11107.

STATEMENT OF THE CASE

TCW, as agent and on behalf of certain funds and accounts, filed a complaint on July 5, 1996 seeking to foreclose on a preferred ship mortgage against the fishing

vessel F/V CHLOE Z ("CHLOE Z"). Certain crew members of the CHLOE Z subsequently filed a complaint in intervention, seeking penalty wages *in rem* against the vessel under 46 U.S.C. § 11107 for their employer's failure to provide them with written employment agreements pursuant to 46 U.S.C. § 10601. They argued below that, under the "plain" meaning of Section 11107, the amount of the penalty to which each member of the crew was entitled was the captain's wages.

In a case of first impression, the court of appeals rejected the crew's proposed statutory construction because it rendered superfluous significant portions of the statutory language. Interpreting the ambiguous statutory language in accordance with accepted rules of statutory construction, consistent with over 150 years of judicial decisions construing similar statutes, the court of appeals held that Section 11107 "entitles the wronged seaman to recover either his promised wages or the highest rate of wages of a seaman of comparable rating at the port from which he was engaged, whichever is higher." No other circuit court has yet considered the question of statutory construction presented here, and Petitioners present no sound reason why this Court should consider the issue at this time rather than allowing the courts of appeals to develop consensus or conflict on the question.

1. The CHLOE Z is a U.S.-flagged tuna boat that fished in the western Pacific. ER Tab 4 at 33.[1] The boat was owned and operated by the Chloe Z Fishing Company ("Chloe Z Co.") and was covered by a preferred ship mortgage held by TCW as agent of certain funds and accounts. ER Tab 1 at 4-5, Tab 7 at 102. TCW never owned or operated the CHLOE Z.

By late 1995, the Chloe Z Co. was in extreme financial distress and unable to pay the crew members for the

[1] "ER" refers to the Appellant's Excerpts of Record on appeal to the Ninth Circuit.

CHLOE Z's final two voyages (Trips 28 and 29). ER Tab 7 at 106-07. The Chloe Z Co. also failed to pay its mortgage holder, TCW. After the boat docked following Trip 29, the crew refused to off-load the fish they had caught, instead remaining on the boat for several months while they waited for payment from their employer. ER Tab 4 at 73.

2. On July 5, 1996, TCW brought this action against the Chloe Z Co. *in personam* and the CHLOE Z *in rem* to foreclose on its preferred ship mortgage. ER Tab 1 at 1. The vessel was immediately arrested and impounded by the U.S. Marshal. ER Tab 15 at 259. In December 1996, the vessel was sold at a U.S. Marshal's auction for $6,710,000 and the proceeds of the sale were deposited in the registry of the Court. These proceeds are not sufficient to pay TCW's secured claim in full after satisfaction of tort and crew wage claims that enjoy higher priority.

3. Twenty of the 22 former crew members from CHLOE Z Trips 28 and 29, plus one crew member from a prior voyage, filed complaints in intervention seeking recovery of unpaid wages. ER Tab 2 at 15-23. The intervening crew members asserted claims *in personam* against the Chloe Z Co. and, by virtue of the automatic maritime lien that exists for seamen's wage claims, also asserted claims *in rem* against the CHLOE Z. They alleged (correctly) that they had not received individual written contracts from their employer, as required by 46 U.S.C. § 10601, ER Tab 2 at 21; that each crew member had been orally promised a share of the CHLOE Z's catch, which varied substantially, depending on the crew member's position, ER Tab 7 at 108; and that they had not been paid for Trips 28 and 29.

Based on these allegations, the crew members asserted a maritime lien against the CHLOE Z *in rem* for statutory wages under 46 U.S.C. § 11107, which provides that a "seaman"

> engaged contrary to a law of the United States . . . is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher.

46 U.S.C. § 11107; ER Tab 2 at 21. In practical terms, the crew members asserted a wage lien enforceable against the vessel to which TCW's preferred mortgage is subordinate. ER Tab 5 at 80.

Eight of the intervening crew members later executed agreements settling and assigning their claims to TCW, which paid the settlement amounts in cash. ER Tab 12 at 180-81. Nonetheless, plaintiffs' counsel continues to assert claims on behalf of at least six of the settling crew members. ER Tab 2 at 15-23. In addition, several junior lienholders on the CHLOE Z filed separate *in rem* complaints in intervention against the vessel. ER Tabs 18-21.

4. The crew members continue to assert falsely, as they did below, that TCW "covertly" encouraged them to fire their counsel and to accept "lowball" settlements. Pet. at 26. TCW did not offer "lowball" settlements, but rather made written settlement offers in the full amount of unpaid agreed wages for every crew member of the CHLOE Z, plus repatriation costs and miscellaneous expenses. ER Tab 12 at 175-76 ¶¶ 12-14, ER Tab 14 at 221, 251. Eight crew members accepted the offers and have received full settlement payments. Appellant's Supplemental Excerpts of Record ("ASER") Tab 30 at 450, Tab 32 at 479.

Nor did TCW encourage the crew members to fire their counsel. The crew members, many of whom are from Croatia, initiated direct settlement talks with TCW's principals (not its counsel) only after the crew members learned that the crew members' counsel had failed to communicate TCW's repeated, written settlement offers to them. ER Tab 11; ASER Tab 23 at 395, Tab 26 at 411-12; Appellees' Supplemental Excerpts of Record

("SER") Tab 12 at 92. Many of the crew members, incensed at their counsel's conduct, sought assistance from independent Croatian counsel in negotiating and consummating the settlements. ER Tab 10 at 159-63, Tab 11 at 165.

Based upon the crew members' one-sided and incomplete description of these events, the district court entered an order directing trial counsel to show cause why they should not be disciplined for their alleged misconduct relating to settlements. SER Tab 11 at 86. Based on TCW's extensive evidentiary submissions, ASER Tab 27 at 419, the district court concluded that the conduct of TCW's counsel conformed to the relevant ethical standards and dismissed the show cause order without imposing any sanctions. ASER Tab 28 at 440.

5. Before discovery was completed, the crew members moved for summary judgment against the vessel. ER Tab 3 at 25. They did not present evidence as to the "highest rate of wages" in each individual crew member's port of engagement. Instead, they said they would accept as penalty wages for each crew member—regardless of position, duties or agreed rate—the rate that had been orally promised to the CHLOE Z's Captain: $39 per ton of tuna caught for Trip 28 and $40 per ton for Trip 29. ER Tab 5 at 84.

TCW opposed the crew members' motion, ER Tab 5 at 84, explaining that the crew members were not entitled under Section 11107 to the Captain's rate of wages, which exceeded their own promised wages by a multiple of as much as eight. Rather, as established by a proper textual interpretation of Section 11107 and almost 200 years of relevant statutory interpretation, a crew member's permissible recovery against the vessel is limited to the higher of (1) the highest rate of wages paid to a seaman with similar rank and duties or (2) what he personally was promised. ER Tab 13 at 195.

The district court granted the crew members' motion, accepting the crew members' position that each was en-

titled to wages at the Captain's rate under the "plain meaning" of the phrase "highest rate of wages at the port" in Section 11107. ER Tab 15 at 263. Employing the Captain's promised share of $39 per ton for Trip 28 and $40 per ton for Trip 29, the district court authorized a total award of approximately $1,854,258, which amounted to an award of $61,074 to each crew member for Trip 28 and $48,000 for Trip 29. ER Tab 15 at 271, 276-77.

6. The court of appeals reversed, holding that Section 11107 does not entitle a crew member to recover the Captain's rate of wages against the vessel as a penalty for his employer's failure to provide a written agreement. *TCW Special Credits v. Chloe Z Fishing Co.*, Pet. App. A. The court of appeals began by noting "at least three problems" with the crew members' proposed construction of Section 11107: first, the phrase "highest rate of wages at the port," contrary to the crew members' contention and the district court's conclusion, is facially ambiguous in that it "fails to identify *whose* 'highest rate of wages' is to be used as the benchmark" for calculating the amount of recovery; second, the crew members' proposed interpretation would render superfluous the phrase "rate of wages" in Section 11107; and third, the crew members' proposed interpretation would likewise render superfluous the phrase "whichever is higher" because the "highest rate of wages" paid to any seaman regardless of job description by definition would always be as high as or higher than "the amount agreed to be given the seaman at the time of engagement." *Id.* at 10a-11a.

Applying the well-settled rule that a statute should be construed in a way that gives every word some operative effect, *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992), the court of appeals held that:

> the only logical and internally consistent reading of the statute is the one urged by both TCW and the United States: a wronged seaman is entitled to recover the higher of either the wages he orally agreed

> to, or the highest rate of wages that could be earned by a seaman at the port of hire *who has the same rating* as the complainant.

Pet. App. A at 11a.

The court of appeals found additional support for its holding in cases construing similar language in predecessor statutes. As the court of appeals correctly observed, those cases "consistently held that a seaman's 'highest rate of wages' was to be measured against seamen with the same rating or similar duties." *Id.* at 12a-13a (citing cases).

Based upon this holding and rationale, the court of appeals remanded the case "for a determination of the amounts due the various complainants." *Id.*

7. The case proceeded to trial on March 18-20, 1998. While acknowledging the court of appeals' holding that Section 11107 does not entitle them to the "highest rate of wages" paid to any seaman, the crew members argued at trial that they nevertheless are entitled to the highest rate of wages paid to any "undocumented seaman," a "rating" nowhere to be found in the applicable statutes or Coast Guard regulations. Because at least one "undocumented seaman" had previously served as a fish captain, the crew members argued that all "undocumented seamen," who comprised the vast majority of the CHLOE Z crew for Trips 28 and 29, are entitled, at a minimum, to the captain's wage of $40 per ton, plus unspecified additional compensation for the time they spent in port.

Although post-trial briefing has been completed, the district court has not yet made a ruling as to the amounts that the crew members are entitled to recover. If the district court agrees with the arguments advanced by the crew members, however, those amounts could be as high as or higher than the summary judgment award that was overturned by the court of appeals.

REASONS FOR DENYING THE PETITION

Petitioners contend that review by this Court is appropriate because the court of appeals' construction of Section 11107 is so unreasonable as to constitute a "revision" of the statute's language. Petitioners are wrong. The court of appeals simply interpreted ambiguous language in that statute in accordance with accepted rules of statutory construction and with over 150 years of judicial decisions construing similar statutes. Moreover, this case, in any event, is inherently unsuitable as a vehicle for resolving the proper construction of Section 11107 because the issue has yet to be addressed by any other lower court and because resolution of the issue here will not even be dispositive of the parties' rights. Review of the issue, if ever appropriate, should await the development of a conflict among the circuit courts and a case in which resolution of the question will make a decided difference in the final resolution of the parties' dispute.

I. THE COURT OF APPEALS' DECISION DOES NOT "REVISE" SECTION 11107

Petitioners' primary argument is that the court of appeals ignored what they assert is the "plain meaning" of Section 11107 by holding that the phrase "highest rate of wages at the port" refers to the "highest rate of wages" that could be obtained by a seaman at the relevant port "who has the same rating as the complainant." Pet. App. A at 11a. Petitioners are incorrect. The court of appeals' decision does nothing more than adopt a reasonable construction of facially ambiguous statutory language in a manner that is supported by more than 150 years of uniform judicial authority.

A. The Court Of Appeals Correctly Recognized That The Phrase "Highest Rate Of Wages At The Port" In Section 11107 Is Ambiguous On Its Face

As the court of appeals properly recognized, the "plain meaning" of a statute can be controlling, by definition,

only where the relevant statutory language is unambiguous. *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). Statutory language is "ambiguous" if it is reasonably susceptible to more than one interpretation. *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 227 (1994).

The phrase "highest rate of wages at the port" in Section 11107 is ambiguous on its face, as four of the five judges who have examined this language have concluded.[2] The word "rate" is defined as "proportional or relative value, measure or degree; the proportion or standard by which quantity of value is adjusted." Black's Law Dictionary (4th ed. 1968). The term "rate of wages," like the word "rate," therefore is a relative term that necessarily takes its meaning from the words and phrases that qualify or explain it.

The text of Section 11107 does not provide any words to qualify or explain the phrase "highest rate of wages." It simply does not specify, for example, the relevant occupation or industry from which the "highest rate of wages" figure is to be drawn. For example, if the relevant industry were the maritime industry, the "highest rate of wages" could be the rate paid to the captain of a supertanker or a luxury liner who happened to be engaged at the same port as the claimant, or the rate paid to a non-vessel employee such as a crane operator or harbor master. It also could be the highest rate paid to a wealthy businessperson, owner or investor who happened to have an office at the relevant port. Nothing in the "plain language" of the statute indicates which of these alternatives is to be adopted.

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[2] Like the court of appeals, United States District Court Judge Moskowitz, whose unpublished opinion is cited by the crew members, Pet. at 9 n.5, concluded that Section 11107 is ambiguous and that its proper construction is a "close question." The district court here is the only court that has found the meaning of Section 11107 to be "plain."

Because the language of Section 11107 does not specify the measures or standards necessary to impart clear meaning to the phrase "highest rate of wages at the port," the statute is unquestionably ambiguous and, therefore, has no "plain" meaning. Instead, the meaning of the phrase "highest rate of wages at the port" must be determined by established rules of statutory construction, legislative history, and judicial constructions of analogous maritime statutes. These sources of interpretation support the holding below.

B. The Court Of Appeals' Construction Of The Phrase "Highest Rate Of Wages At The Port" In Section 11107 Is Consistent With The Text Of The Statute As A Whole And Cases Interpreting Similar Language In Predecessor Maritime Statutes

Applying the available tools of statutory construction, the court of appeals adopted a construction of the phrase "highest rate of wages at the port" that is consistent with the text of Section 11107 as a whole and cases interpreting similar language in predecessor maritime statutes. As the court of appeals properly recognized, Section 11107 provides that a seaman engaged "contrary to a law of the United States" may recover the "higher" of two alternative wage rates. The first is the "highest rate of wages at the port from which the seaman was engaged." The second is the "amount agreed to be given the seaman at the time of engagement." 46 U.S.C. § 11107. Thus, by its express terms, the statute requires in all cases a comparison between the "highest rate of wages at the port" and the amount "agreed to be given" to the claimant.

If, as the crew members contend and the district court concluded, the "highest rate of wages at the port" meant the highest paid seaman, regardless of job description, the amount could never be less than the "amount agreed to be given the seaman at the time of engagement." Under this interpretation, there would be no need to determine the rate "agreed to be given" to the seaman, and that portion

of Section 11107 would become superfluous. The two-pronged structure of Section 11107 makes sense only if the phrase "highest rate of wages at the port" refers to the market rate of wages for a similarly situated seaman with like position and duties. The crew members never addressed this point below, and do not address it here.

This construction of Section 11107 is confirmed by more than 150 years of judicial decisions interpreting predecessor statutes to Section 11107. For example, courts applying R.S. § 4523, the direct predecessor to Section 11107, held without exception that the phrase "highest rate of wages at the port from which the seaman was shipped" in that statute meant the highest rate of wages for a similarly situated seaman. *The Pacific*, 23 F. 154 (W.D. Pa. 1885) ("highest rate of wages" recoverable by deckhand shipped without written articles was "the rate of wages for that trip for deckhands"); *Lent Traffic v. Gould*, 2 F.2d 554 (3d Cir. 1924) (tacitly construing Section 4523 to require river pilot be paid "highest" wage of a river pilot).

Courts construing other maritime statutes with similar language likewise have, as the court of appeals observed, reached the same results. Pet. App. A at 12a-13a. *See, e.g., The James H. Shrigley*, 50 F. 287 (N.D.N.Y. 1892) (interpreting R.S. 4520 and 4521, applicable to coastwise seamen, as entitling a cook to recover "highest" wage for a cook); *The Lud Keefer*, 49 F. 650 (W.D. Pa.), *modified*, 51 F. 44 (3d. Cir. 1892) (concluding that a pilot was entitled under Section 4521 to the "highest" pilot's wage); *The Australia*, 2 F. Cas. 236 (D. Me. 1859) (interpreting predecessor to R.S. 4521 as permitting cook to recover "highest" wage rate for a cook).[3]

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[3] The court of appeals' construction of Section 11107 is also consistent with the statute's sparse legislative history. The House Report that accompanied the legislation in 1983 explained that the bill was "for the most part a restatement of the existing safety and seamen protection laws administered by the Coast Guard." H.R.

This Court's decision in *Griffin v. Oceanic Contr., Inc.*, 458 U.S. 564 (1982), on which Petitioners rely heavily, is not to the contrary. The question in *Griffin* was whether the district courts, exercising their equitable powers, may reduce the monetary recovery required by 46 U.S.C. §§ 10301-10321, where the resulting award seems excessive. The statutes primarily at issue in *Griffin* were Section 10321, which expressly provides that, where an employer fails to provide written agreements for foreign and intercoastal voyages, "the vessel is liable in rem" for "a civil penalty of not more than $5,000" per violation, 46 U.S.C. § 10321; and Section 10313(g), which expressly provides that any employer who delays payment of wages is liable for a "penalty" of two days' wages for each day of delay. 46 U.S.C. § 10313(g).

The court of appeals in *Griffin* recognized that the language of Section 10313(g) was "plain," but nevertheless held that the district court had discretion not to impose the statutorily required penalty, concluding that a literal interpretation of the statute would produce an "absurd and unjust result which Congress could not have intended." *Griffin*, 458 U.S. at 574. This Court reversed, holding simply that the unambiguous language of Section 10313(g) must be enforced even where such enforcement results in large punitive awards. *Id.* at 574-77.

Rep. No. 98-338, *reprinted in* 1983 U.S.C.C.A.N. 924, 929. The Report went on to explain the purpose of Section 11107 as follows: "Section 11107 entitles seamen engaged contrary to any United States law to leave the service of the vessel without loss of wages." *Id.* at 1018. In contrast, for coastwise voyages, it explained that "Section 10508 provides a fair wage to be paid to a seaman who was engaged without a shipping agreement. . . . It also provides a penalty for violation of its provisions." *Id.* at 1012. *See also id.* at 1010 (discussing similar "penalty" provisions of Section 10321 for foreign voyages). This legislative history makes clear that Congress intentionally decided not to impose a penalty for violating the written agreement requirement of Section 10601, in contrast to its decision to include a punitive sanction for the same violation in the merchant seaman industry.

The phrase "highest rate of wages at the port" in Section 11107, unlike the language of Section 10313(g), is ambiguous on its face. The meaning of that phrase therefore must be determined by resort to established principles of statutory construction. Thus, the holding below does no violence to the statutory text and does not warrant review.

Nor is there any merit to the crew members' assertion that the court of appeals' construction of Section 11107 will unfairly burden seamen by forcing them to engage in "years" of fact-ridden litigation to establish the particular "highest rate of wages" to which they are entitled. The crew members make no attempt whatsoever to explain why demonstrating the "highest rate of wages" for a similarly situated seaman is inherently more difficult than demonstrating the "highest rate of wages" for non-similarly situated seamen. A plaintiff can meet this burden simply by subpoenaing the records of a single vessel owner who hires similarly situated seamen from the same port from which the claimant embarked.

II. THIS CASE, IN ANY EVENT, IS NOT THE PROPER VEHICLE FOR THIS COURT TO RESOLVE THE PROPER CONSTRUCTION OF THE PHRASE "HIGHEST RATE OF WAGES" IN SECTION 11107

If there is any question as to whether the court of appeals' construction of the phrase "highest rate of wages at the port" is correct, this case nevertheless is not the proper vehicle to resolve the issue for at least three reasons. First, the court of appeals' decision is the first reported opinion even to address the issue. Resolution of the issue by this Court should wait until a conflict arises among the lower courts.[4]

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[4] The crew members misleadingly suggest, Pet. at 4, that the absence of any conflict among the lower courts has no significance where maritime statutes are at issue. None of the cases cited by the crew members provides any support for their position. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468

Second, the construction of the phrase "highest rate of wages at the port" urged by Petitioners would not benefit them because it would result in a punitive award and, accordingly, would not be enforceable *in rem*. Historically, a seaman's wage lien arises only to compensate the seaman for services rendered to the vessel. *Long Island Tankers Corp. v. S.S. Kaimana*, 265 F. Supp. 723, 726 (N.D. Cal. 1967), *aff'd* 401 F.2d 182 (9th Cir. 1968); *Citibank, N.A. v. Vessel American Maine*, 865 F.2d 24, 27 (9th Cir. 1988). Congress codified the historical right to a compensatory seaman's wage lien in 46 U.S.C. § 31301, providing a statutory "preferred maritime lien" for "*wages of the crew of the vessel.*" (emphasis added). Recognizing that Congress did not alter the historical limitations on maritime liens, courts have uniformly held that the phrase "wages of the crew" includes only compensation for services actually rendered to the ship. *See, e.g., The Eastern Temple*, 94 F.2d 374, 376 (4th Cir. 1938); *Nadle v. M.V. TEQUILLA*, 1973 AMC 909 (S.D.N.Y. 1973); *Prudential Ins. v. U.S. Lines, Inc.*, 915 F.2d 411 (9th Cir. 1990).[5]

(1987), *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1 (1981), and *United States v. United Continental Tuna Corp.*, 425 U.S. 164 (1976), involved the rights of private parties under the Eleventh Amendment or specific federal statutes to sue government officials or agencies. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), *Director, Office of Workers' Comp. Prog. v. Perini North River Assoc.*, 459 U.S. 297 (1983), and *Morrison-Knudsen Const. Co. v. Director, Office of Workers' Comp. Prog.*, 461 U.S. 624 (1983), involved the interpretation of the Longshoremen and Harbor Workers' Compensation Act, which affects the entire maritime industry. Neither issue is presented here.

[5] Congress has created narrow statutory exceptions to this rule under specific circumstances. *See, e.g.*, 46 U.S.C. § 10321 (requiring that seamen on foreign voyages be provided with written contracts, providing a "civil penalty of not less than $5,000 per violation" and making the "vessel liable *in rem*" for that penalty); 46 U.S.C. § 10508 (same). Section 11107, however, contains no such exception, and therefore is subject to the normal rule that punitive damages, or "penalties," are not recoverable *in rem*.

Finally, the correctness of the court of appeals' ruling here may have no practical significance to the parties. As previously mentioned, since the decision of the court of appeals was rendered, this case has already been tried, with Petitioners urging the district court to award them a larger amount than the previous award. If the district court agrees with the crew members' arguments, the court of appeals' decision, and any decision reached by this Court regarding the proper construction of Section 11107 would have little or no practical impact on the parties.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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